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Supreme Court of the United States

DON EUGENE SIEGELMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under *McCormick v. United States*, 500 U.S. 257, 273 (1991), a connection between a campaign contribution and an official action is a crime "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking."

Does this standard require proof of an "explicit" *quid pro quo* promise or undertaking in the sense of actually being communicated expressly, as various Circuits have stated; or can there be a conviction based instead only on the inference that there was an *unstated* and *implied* agreement, a state of mind, connecting the contribution and an official action?

2. Does the "intent" clause of the obstruction of justice statute 18 U.S.C. § 1512(b)(3) ("with intent to . . . hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense . . .") require proof of the specific intent to interfere with communications to law enforcement? Or is this element of the statute satisfied by proof of an intent to engage in a "coverup" more generically?

PARTIES TO THE PROCEEDING BELOW

The parties in the Court of Appeals were Don Eugene Siegelman (Petitioner), as Defendant-Appellant; Richard Scrushy, as Defendant-Appellant; and United States of America (Respondent), Appellee.

There were other defendants in the District Court, Paul Michael Hamrick and Gary Mack Roberts, but they were not parties in the Court of Appeals.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Don Eugene Siegelman respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Eleventh Circuit, *United States v. Siegelman*, 561 F.3d 1215 (11th Cir. 2009).

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 561 F.3d 1215, is reproduced in the Appendix at 1a-61a. The order of the Court of Appeals denying rehearing is reproduced in the Appendix at 62a. The order and opinion of the United States District Court for the Middle District of Alabama, denying motions

for judgment of acquittal, is at 65a-72a. The relevant jury instructions as given by the District Court are at 63a-64a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals issued its decision on March 6, 2009. The Court of Appeals denied Governor Siegelman's timely application for rehearing on May 14, 2009.

STATUTES INVOLVED

The statutes at issue are in the appendix, 73a-75a.

STATEMENT

Petitioner, Don Siegelman, was the Governor of Alabama from 1999 to 2003. He had previously served as Alabama's Lieutenant Governor, Secretary of State, and Attorney General.

In 2005, Governor Siegelman was indicted along with other defendants in the United States District Court for the Middle District of Alabama. The jury rejected most charges, but convicted Governor Siegelman on seven counts.

Six of those counts were 18 U.S.C. §§ 1341 and 1346 "honest services" mail fraud, 18 U.S.C. § 666 bribery, and conspiracy charges, all relating to Governor Siegelman's appointment of co-defendant Richard Scrushy to the State's Certificate of Need (C.O.N.) Board. The theory of the prosecution was that Governor Siegelman's exercise of his appointment power was linked to contributions that Scrushy had raised to support a referendum campaign. The campaign, which Governor Siegelman supported, would have

established a State lottery to fund public education. The seventh and final count of conviction was an obstruction of justice charge under 18 U.S.C. § 1512(b)(3).

This Petition presents important questions of law, raising the concern that Governor Siegelman has been convicted for things that are not crimes. Answers to these questions are important, not only for the sake of Governor Siegelman, but for the sake of all elected officials throughout the nation, and of all who contribute to electoral or issue-referendum campaigns.

A. The charges relating to the C.O.N. Board appointment, and Question 1.

Government officials often appoint major political contributors to boards, ambassadorships and the like. Likewise, government officials often take other actions, such as voting on legislation or taking executive action, that benefit people who have given them campaign contributions. Some degree or type of linkage between contribution and action can be inferred in many cases, if not all.

What degree or type of linkage is enough to take a case across the line from politics (which voters can take into account as they see fit) into crime? This Court answered this question, as to the Hobbs Act, in *McCormick v. United States*, 500 U.S. 257, 273 (1991): there is a crime "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking."

The present case involves other statutes, yet it implicates the same concerns and considerations that drove the decision in *McCormick*. And it calls upon this Court to clarify what the *McCormick* standard is. Does it require proof of an actual communication by the official, promising or agreeing that the action will follow the contribution? Or can there be a conviction based instead only on the inference of an unspoken state of mind linking the two?

The allegation underlying the first six counts of conviction, in this case, was that there was an unlawfully close connection between Governor Siegelman's appointment of Scrushy to the C.O.N. Board, and Scrushy's raising of contributions for a referendum campaign that Governor Siegelman supported. It is this alleged connection, and the legal question of what sort of connection must be proven to take such a situation out of the realm of mere politics in the realm of crime, that makes or breaks all of these counts.[1]

Scrushy was the CEO of one of Alabama's, and the nation's, leading healthcare corporations. He had served on Alabama's C.O.N. Board through appointment by three previous Governors. There is nothing at all odd about appointing a healthcare executive to the Board; in fact, several seats on the Board are

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[1] There was nothing else allegedly unlawful about Governor Siegelman's appointment of Scrushy, other than its alleged connection to the contributions. This is confirmed by the fact that the Court of Appeals reversed Governor Siegelman's conviction on two counts, for insufficiency of the evidence. Those were the counts having to do with things that Scrushy or others had done while on the C.O.N. Board; the Court of Appeals realized that there was no evidence that Governor Siegelman was complicit in any such thing. [23a-29a, 561 F.3d at 1229-32].

reserved by law to health care provider representatives. [4a-5a, 561 F.3d at 1220 & n.5].

One of Governor Siegelman's initiatives, during his campaign and his administration, was a State lottery, with the proceeds to support education. Other States had instituted such programs with great success. Under Alabama law, the institution of such a program would require a vote of the people. There was, therefore, an issue-advocacy or referendum campaign on the question. Governor Siegelman raised contributions to a fund supporting the pro-lottery side of that referendum campaign. [4a, 561 F.3d at 1220].

Scrushy raised and made substantial contributions to the lottery campaign. And Governor Siegelman reappointed Scrushy to the C.O.N. Board.

What connection, if any, was there between the contributions and the appointment? The key parts of the prosecution's evidence came through the testimony of Governor Siegelman's former aide Nick Bailey, who was testifying under a cooperation agreement with the government and hoping for a reduced sentence himself. Taking Bailey's testimony as true, one could conclude that Governor Siegelman sent word to Scrushy that he wanted Scrushy to contribute substantially to the lottery campaign. And one could conclude that Bailey told Governor Siegelman that Scrushy wanted reappointment to the C.O.N. Board. One could also conclude, from the evidence, that Scrushy or his colleagues saw the contribution as the key to obtaining the reappointment.

In terms of what Governor Siegelman knew or said about any connection between the contribution and the appointment, again the high-water mark of the prosecution's evidence came through Bailey's testi-

mony. Bailey testified that he "reminded the Governor periodically of the conversations that [Bailey] had with [Scrushy associate] Eric Hanson and the conversations that the Governor had with Eric Hanson about what Mr. Scrushy wanted for his contributions, and that was the CON Board." [6a, 561 F.3d at 1221]. And Bailey testified that after Scrushy made the first substantial contribution, Bailey and Governor Siegelman had a conversation. As the Court of Appeals recounted it, "Bailey asked, 'what in the world is he [Scrushy] going to want for that?' Siegelman replied, 'the CON Board.' Bailey then asked, 'I wouldn't think that would be a problem, would it?' Siegelman responded, 'I wouldn't think so.'" [7a, 561 F.3d at 1221].

In other words, there is certainly no evidence beyond a reasonable doubt that Governor Siegelman actually promised Scrushy, or overtly agreed with him, that an appointment to the C.O.N. Board would be given in exchange for contribution to the lottery campaign. The Court of Appeals did not suggest that there was such evidence. Instead it held, as we will discuss in more depth below, that *McCormick* does not require such evidence.

Governor Siegelman presented and preserved his contention about the applicable legal standard following *McCormick*, both in terms of jury instructions and in terms of sufficiency of the evidence.

Governor Siegelman proposed jury instructions that would have told the jury of the necessity of proof beyond a reasonable doubt of an "explicit *quid pro quo*" connection between the contributions and the appointment. And he objected to the District Court's instructions on the grounds that they failed to include that element. The District Court's "honest

services" fraud instructions required no proof of a *quid pro quo* arrangement at all, but instead allowed conviction upon the mere conclusion that Governor Siegelman "intended" to act "as a result of" campaign contributions. [63a]. The District Court's § 666 instructions told the jury that there must be proof that the official and the contributor "agree that the official will take specific action in exchange for the thing of value." [18a-19a, 561 F.3d at 1227]. But, over Governor Siegelman's objection, the District Court refused to tell the jury that such "agreement" must be of the "explicit" sort, as contrasted with being just a matter of an unspoken state of mind that is inferred from the circumstances.

On appeal, Governor Siegelman continued to press the argument that the *McCormick* standard applies to these statutes, and that it requires proof of an "explicit *quid pro quo*," an "explicit promise or undertaking by the official" linking the official act to the campaign contribution. Governor Siegelman argued that an inference about what the official had in mind is not enough; what must be shown under the *McCormick* standard, he argued, is an actual communication from the official, promising the action in exchange for the contribution.

The Court of Appeals did not deny that the *McCormick* standard applies to the "honest services" statute and to § 666, just as it does to the Hobbs Act. Nor did the Court of Appeals deny that the *McCormick* standard applies to cases involving referendum or issue-advocacy contributions, just as it does to election campaigns.

And, crucially, the Court of Appeals did not suggest that the evidence was sufficient, or that the jury instructions were correct, if Governor Siegelman was

correct on the content of the *McCormick* standard. The Court of Appeals did not suggest that the conviction could be affirmed if the law requires proof of an actual overt *quid pro quo* promise or undertaking.

Instead, the Court of Appeals affirmed the conviction on these counts by disagreeing with Governor Siegelman as a matter of law on the content of the *McCormick* standard. The crux of the court's reasoning was that when this Court in *McCormick* required an "explicit promise or undertaking," an "explicit *quid pro quo*," the word "explicit" did not mean "express," or actually spoken.

> *McCormick* does use the word "explicit" when describing the sort of agreement that is required to convict a defendant for extorting campaign contributions. It does not, however, mean *express*. Defendants argue that only "proof of actual conversations by defendants," will do, suggesting in their brief that only express words of promise overheard by third parties or by means of electronic surveillance will do.
>
> But *McCormick* does not impose such a stringent standard.

[16a, 561 F.3d at 1225-26 (emphasis in original)].

The Court of Appeals took *McCormick*'s word "explicit" to mean only that there must be an agreement, express *or* implied, linking the contribution to some "specific" official action. But the Court of Appeals insisted that the agreement does not have to be actually communicated expressly; it is enough, said the Court of Appeals, if the jury can infer the existence of an unspoken agreement from the surrounding circumstances.

> Since the agreement is for some specific action or inaction, the agreement must be *explicit*, but there is no requirement that it be *express*.

[17a, 561 F.3d at 1226 (emphasis in original)]. The Court of Appeals further stated, in this vein, "Furthermore, an explicit agreement may be 'implied from [the official's] words and actions.'" [18a, 561 F.3d at 1226 (brackets in original)]. Likewise the Court of Appeals insisted that the evidence was sufficient to prove the requisite "state[] of mind," regardless of whether a *quid pro quo* promise was made expressly. [21a, 561 F.3d at 1228].

So in the Eleventh Circuit, the "explicit" aspect of *McCormick*'s standard does not mean "express," or overtly communicated. Furthermore, according to the decision below, a promise that is merely "implied," and is only a matter a "state[] of mind" rather than being verbally expressed, can nonetheless be deemed "explicit" within the meaning of *McCormick*. As we will show below, there is a clear split in authority between the decision below, and the decisions of other Circuits; and this is a question on which ambiguity and regional difference are especially intolerable.

B. The § 1512(b)(3) charge, and Question 2.

Other than the counts pertaining to the C.O.N. Board appointment, the sole remaining count of conviction charged one act as obstruction of justice under 18 U.S.C. § 1512(b)(3): that Governor Siegelman caused his then-aide Nick Bailey to write him a check for $2,973.35, with a notation on the check saying "balance due on m/c." This was the purchase price for the remaining interest in a motorcycle that, upon the

completion of this transaction, Bailey had bought in full from Governor Siegelman.[2]

The Court of Appeals viewed Bailey's purchase of the motorcycle as part of an effort to "cover up" a "'pay-to-play' payment" that another person, Lanny Young, had allegedly made. [2a, 561 F.3d at 1219]. (On the merits, the jury had rejected all charges alleging that there was actually such a "pay to play" scheme with Young.) The theory is that this purchase of the motorcycle was not *bona fide*. The theory is that what was really going on was that Young had, earlier, indirectly given money to Governor Siegelman through Bailey, and this check was part of an effort to make it seem in retrospect as though that alleged indirect transfer had just been a loan to Bailey so that he could buy the motorcycle.

The Court of Appeals, affirming the denial of Governor Siegelman's motion for judgment of acquittal, set forth its view of the facts pertaining to the § 1512(b)(3) charge at 561 F.3d at 1222-23, and 1233-36. 9a-11a, 32a-38a. The Court of Appeals opined that there was sufficient evidence to conclude that Governor Siegelman had persuaded Bailey, and that he had engaged in misleading conduct towards Bailey's lawyer, in regard to the check from Bailey to Governor Siegelman. (Persuading, and engaging in misleading conduct, are two of the types of acts that can constitute a violation of § 1512(b)(3), if done with the intent that the law prohibits.) And the Court of Appeals deemed the evidence sufficient to show that the check was part of a "coverup" of an earlier payment from Young. That colloquialism—"coverup" or

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[2] Governor Siegelman had earlier bought the motorcycle for himself. [9a, 561 F.3d at 1222].

"cover up," repeated at least sixteen times in the appellate opinion—was the centerpiece of the Eleventh Circuit's portrayal of the facts.

The second question for this Court asks whether the facts portrayed by the Court of Appeals, even if true, make out a violation of the statute. As we will show, the Court of Appeals upheld the conviction only by giving the statute a broad coverage that is at odds with the statute's plain text. The statute has a precise and narrower coverage; and it involves a required element of proof that neither the Eleventh Circuit, nor the prosecutors, even claimed was satisfied here. That is the element that the statute itself sets forth: "with intent to . . . hinder, delay, or prevent . . . communication to a law enforcement officer or judge . . . " By adopting the loose colloquialism "coverup" in place of adherence to the text of the statute's "intent" clause, the Court of Appeals departed from the law and from decisions of other Circuit Courts.

REASONS FOR GRANTING THE PETITION

A. The first question presented is of enormous importance to all elected officials and campaign contributors, is the subject of a Circuit split, and is a question on which ambiguity in the law is intolerable.

On the first question presented, there is deep disagreement among the federal Circuit Courts about the legal standard that makes a crime of the alleged connection between a campaign contribution and an official action. As a result of the decision below, the Circuit Courts are now divided as to whether this Court's decision in *Evans v. United States*, 504 U.S. 255 (1992), dilutes the "explicit *quid pro quo*" stan-

dard of *McCormick v. United States*, 500 U.S. 257, 273 (1991), in cases involving campaign contributions.

As explained above, the standard of *McCormick* is that a linkage between a campaign contribution and an official action is criminal "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking." *Id.*

This Court, in *McCormick*, recognized how important it is, that there be a clear line in this context to divide the lawful from the unlawful. That was one of the avowed goals of *McCormick* itself: to ensure that there is clarity as to where that line is. The Court noted that officials routinely serve constituents; that campaigners must necessarily raise money through contributions; and that there will be situations in which official action affecting a contributor will follow close in time to a contribution. *McCormick*, 500 U.S. at 272. The Court applied a "clear statement" rule to Congress, inferring that Congress would speak clearly about such situations if it wished to forbid them in a criminal statute. *Id.* at 272-73. And this Court, upon adopting the stringent "explicit promise or undertaking" standard, again emphasized the value of clarity in the law: "This formulation defines the forbidden zone of conduct with sufficient clarity." *Id.* at 273.

The year after *McCormick*, this Court decided *Evans*; and as a result of *Evans*, what was made clear in *McCormick* became arguably less clear. The question that this Court took up in *Evans* was something entirely separate from the *McCormick* "explicit *quid pro quo*" question. It was "whether an affirmative act

of inducement by a public official, such as a demand, is an element of the offense of extortion 'under color of official right' prohibited by the Hobbs Act." *Evans*, 504 U.S. at 256. *Evans* was not petitioned, briefed, or argued as a case about the meaning of, or possible alteration of, the *McCormick* "explicit *quid pro quo*" standard for cases involving contributions.

But in the end, this Court's decision in *Evans* included a short passage mentioning *McCormick*:

> We reject petitioner's criticism of the instruction, and conclude that it satisfies the *quid pro quo* requirement of *McCormick v. United States*, 500 U.S. 257 (1991), because the offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts; fulfillment of the *quid pro quo* is not an element of the offense.

Evans, 504 U.S. at 268. And Justice Kennedy, concurring in part and concurring in the judgment, wrote a separate opinion that included views on *quid pro quo* as an element of all Hobbs Act extortion cases. *Id.* at 272-78. Included in Justice Kennedy's separate opinion was the view that the *quid pro quo* does not have to be stated "in express terms" in order to amount to a crime. *Id.* at 274.

After *Evans*, there are now two competing schools of thought about the nature of the "explicit *quid pro quo*" requirement under *McCormick*, in cases involving campaign contributions. (1) In some Circuits, including at least the Second, Sixth, and Ninth, the prosecution is required to prove that there was an explicit, meaning "express," promise or agreement by the official that he would take the official action in exchange for the contribution. An inference about

unspoken states of mind is not enough in those Circuits, in a case involving campaign contributions rather than some personal payment to the official. (2) The competing view, exemplified by the decision below, insists that the contributor and the official can both be convicted if the jury could find that there was an *unspoken, merely implied*, exchange of contribution for a certain official action. [16a-18a, 521 F.3d at 1226 (treating *Evans* as support for the rule allowing conviction based on unspoken states of mind and implicit linkage between contribution and official action)]. It is not clear that any other Circuit shares the view of the Eleventh Circuit in this regard.

It is important, for the sake of all elected officials, candidates, and campaign contributors, that there be clarity and uniformity on the answer to this question. As the Court of Appeals admitted in this very case, the answer to this question will implicate, and affect, core First Amendment values and interests.

> The bribery, conspiracy and honest services mail fraud convictions in this case are based upon the donation Scrushy gave to Siegelman's education lottery campaign. As such, they impact the First Amendment's core values—protection of free political speech and the right to support issues of great public importance. It would be a particularly dangerous legal error from a civic point of view to instruct a jury that they may convict a defendant for his exercise of either of these constitutionally protected activities. In a political system that is based upon raising private contributions for campaigns for public office and for issue referenda, there is ample opportunity for that error to be committed.

[13a-14a, 561 F.3d at 1224].

Several Circuits have held that, after *Evans* and *McCormick*, the law is as follows: (1) that for cases involving official action allegedly taken in exchange for *campaign contributions*, *McCormick*'s original "explicit *quid pro quo*" standard still robustly applies, meaning that prosecutors must prove an "express" promise or agreement linking the contribution and the official action; and (2) that for cases where the official has personally received money that is *not* a campaign contribution, a looser "*quid pro quo*" standard applies, in which the linkage does not have to be proven to have been "explicit" (or "express").

The Second Circuit, for instance, explained that this is the law in *United States v. Ganim*, 510 F.3d 134 (2nd Cir. 2007) (Sotomayor, J.). The Second Circuit understood *McCormick* as holding that "proof of an express promise is necessary when the payments are made in the form of campaign contributions." *Ganim*, 510 F.3d at 142. The Court continued, *id.* at 143, that it had "harmonized" *McCormick* and *Evans* by recognizing that outside the campaign contribution context there still must be proof of a *quid pro quo*, but not an explicit one. *Evans* "modified [the *quid pro quo*] standard in non-campaign contribution cases," *Ganim*, 510 F.3d at 143, such that in cases that do not involve campaign contributions, the *quid pro quo* can be "implied" as contrasted with express. *Id.*

The Ninth Circuit followed *Ganim* in this regard, and stated this understanding comprehensively, in *United States v. Kincaid-Chauncey*, 556 F.3d 923, 936-37 (9th Cir. 2009): for campaign contributions there must be proof of an "express" *quid pro quo* promise in order to make out a crime, but for cases that do not involve contributions the *quid pro quo* may be implicit. The Sixth Circuit is in the same

camp, as reflected in its discussion in *United States v. Abbey*, 560 F.3d 513, 517-18 (6th Cir. 2009).

The Eleventh Circuit, by contrast, takes *Evans* as having diluted the "explicit *quid pro quo*" standard in *all* cases—those involving campaign contributions as well as those involving personal payments to the official. Based on that understanding, the Eleventh Circuit held that *McCormick*'s "explicit *quid pro quo*" standard does *not* require proof of an "express" promise or agreement linking the contribution and official action. [16a-17a, 561 F.3d at 1226]. In the Eleventh Circuit's view, there can be conviction if there is proof from which the jury could *infer* an *unspoken state of mind*, on the part of the official and the contributor, linking the contribution and the action. "Explicit," declared the Eleventh Circuit, does not mean "express"; and so the official and the contributor can be convicted and jailed even where there was no promise or agreement spoken. [16a, 561 F.3d at 1225-26].

The Eleventh Circuit suggested that its view of *Evans* is supported by Sixth Circuit precedent. [17a-18a, 561 F.3d at 1226, citing and quoting *United States v. Blandford*, 33 F.3d 685, 696 (6th Cir. 1994) ("*Evans* instructed that by 'explicit' *McCormick* did not mean express")]. But in fact not even the Sixth Circuit believes that, anymore. Instead, as noted above, the Sixth Circuit is among those Courts that treats *Evans* as having adopted a less stringent, non-"explicit," *quid pro quo* standard for cases that do *not* involve campaign contributions. Cases involving campaign contributions still require the heightened showing, one that is not diluted by *Evans*. *See Abbey*, 560 F.3d at 517 (treating *Blandford*'s analysis of *Evans* as dictum); *id.* at 517 ("Not all quid pro quos

are made of the same stuff. . . . *Evans* modified the standard in non-campaign contribution cases . . ."); *id.* at 517-18 (reflecting that in non-campaign contribution cases, the difference is that the *quid pro quo* agreement does not have to be explicit).

Upon full review, the Court should firmly reject the Eleventh Circuit's broad reading of *Evans*. The single sentence about *McCormick*, in the Court's opinion in *Evans*, is on its face not a comment on the "explicit" aspect of *McCormick*'s "explicit *quid pro quo*" holding. It is not about what "explicit" means, or whether explicitness is required. The Court was talking in *Evans* about something entirely different, about an argument that could be answered by saying that "*fulfillment* of the *quid pro quo* is not an element of the offense." *Evans*, 504 U.S. at 268 (emphasis supplied). The issue at hand was about fulfillment, or consummation, of an exchange—not about how explicit the planned exchange had to be.

The briefs in *Evans* confirm this. The argument that Evans was making, to which the Court was responding, was twofold: first that the inquiry had to focus on the official's intent rather than the payor's, and second that the official did not commit a crime until he actually attempted to follow through with official action. *See* Brief of Petitioner in *Evans*, 1990 U.S. Briefs 6105, 1991 U.S. S. Ct. Briefs LEXIS 492, *74-78. Responding, the United States wrote a passage that this Court adopted nearly verbatim in its opinion as quoted above. Brief of United States in *Evans*, 1990 U.S. Briefs 6105, 1991 U.S. S. Ct. Briefs LEXIS 493, *51.

As a matter of proper interpretation of precedent, therefore, the Eleventh Circuit's broad view of *Evans*, as vitally affecting the meaning of "explicit," is wrong.

Moreover, the Eleventh Circuit's view of the word "explicit"—that it does not mean "express"—is quite idiosyncratic as a matter of ordinary language.[3] And in taking the view that the word "explicit" merely requires that the *quid pro quo* agreement be about a "specific" action, 17a-19a, 561 F.3d at 1226-27, the Eleventh Circuit was merely taking the side of the dissent in *McCormick*. *See McCormick*, 500 U.S. at 282-83 (Stevens, J., dissenting) (contending that an "implicit" linkage between a contribution and a "specific" action was enough to constitute a crime). Likewise, the Eleventh Circuit's view cannot be squared with *McCormick*'s further description of the cases in which a crime has occurred: "In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking." *Id.*, 500 U.S. at 273. Here, even on the description by the Court of Appeals, there is simply no evidence that Governor Siegelman ever "assert[ed]" any such thing. Having in mind an intention to do something, but not speaking it directly and out loud as a promise, does not count as "assert[ing]" that one will do it. In short, the decision below represents exactly the view that this Court rejected in *McCormick*.

But whether or not the Court already sees the Eleventh Circuit as being wrong about what the *McCormick* standard is, there can be no doubt that the Eleventh Circuit has starkly disagreed with other Circuits on the question. Nor can there be any doubt that Governor Siegelman stands convicted by virtue of a standard that no reasonable person would have

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[3] The Oxford English Dictionary, for instance, defines "express" as "stated explicitly." <http://www.askoxford.com/concise_oed/express_3?view=get>. Merriam-Webster lists the words as synonyms. <http://www.merriamwebster.com/dictionary/explicit>.

known, in advance, to be the law; this in itself raises serious questions of fairness.

The question presented here is important not only to Governor Siegelman, but also to all public officials who raise or receive campaign contributions and to all citizens who contribute. Every interested person should be able to know in advance where the line is, between politics and crime. Raising campaign funds, and donating to campaigns, are not only a necessity in our modern democracy; beyond that, these activities are expressions of constitutional rights under the First Amendment. (They can be regulated to a degree, of course, but still they are of constitutional importance). Likewise, seeking governmental action is itself a constitutional right under the First Amendment's "petition" clause. And officials must take action, including action that affects contributors. If the definition of relevant crimes is different from one Circuit to the next, and if the definitions are uncertain, then officials and citizens take all these actions at their peril. The exercise of constitutional rights will be chilled by this lack of clarity.

Moreover, in defining the relevant standard, the courts likewise define the degree of discretion that prosecutors enjoy; and discretion that is wider, in this context, is more dangerous. The Eleventh Circuit's standard, by allowing prosecutors to seek indictment based not on words that are spoken but on states of mind that are inferred, grants an enormous amount of discretion. It gives prosecutors the authority to decide which governmental officials are to be trusted to have made decisions for legitimate reasons, and which ones should be prosecuted because their thoughts are believed to have been inappropriate. And this heightened degree of prosecutorial discre-

tion is dangerous not only because it can lead to unjust prosecutions, but because it can undermine public confidence in the prosecutorial function. When the line between law and politics is unclear, the public does not and cannot have faith that all prosecutors choose their targets legitimately.

For these reasons—because there is disagreement among the Circuits, and because the question is important to our democracy—the Court should grant review to clarify the *McCormick* standard.

One might perhaps argue, as a reason for denying review in this case, that *McCormick* was a Hobbs Act case and that this case is not. But that distinction should not stand in the way of review. There are good reasons to believe that the same standard should apply,[4] and to our knowledge no Circuit has denied it. Even the Eleventh Circuit, below, did not deny that the *McCormick* standard should be the same as to these statutes as it is in the Hobbs Act context. The Court of Appeals stopped just short of so holding, but recognized the force of the point. [15a, 561 F.3d at 1225]. The *McCormick* standard is squarely at issue here, just as it has been in the cases from other Circuits that have interpreted *McCormick* differently. There is a Circuit split on what *McCormick* means, whether under the Hobbs Act or other statutes.[5]

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[4] *See, e.g., United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993) (recognizing that extortion and bribery are but "different sides of the same coin" and that it would therefore make sense for the same *McCormick* standard to apply).

[5] As we noted above, a significant part of the reasoning of *McCormick* was a "clear statement" rule, an expectation that Congress would speak explicitly if it wished to adopt a standard that would sweep more campaign-contribution cases into the

One might conceivably argue, in opposition to certiorari, that this case is slightly different from some other *McCormick* cases, since this case involves a contribution to a referendum campaign instead of a campaign for elective office. But if this distinction mattered at all, it would matter in the sense of urging even *more* protection for the contributor and the official in this very case, not less. As the Eleventh Circuit noted below,

> Arguably, the potential negative impact of these statutes on issue-advocacy campaigns is even more dangerous than it is to candidate-election campaigns. Issue-advocacy campaigns are a fundamental right in a free and democratic society and contributions to them do not financially benefit the individual politician in the same way that a candidate-election campaign contribution does. Defendants assert, and we do not know otherwise, that this is the first case to be based upon issue-advocacy campaign contributions.

[13a, 561 F.3d at 1224 n.13]. Therefore, this distinction should not stand in the way of certiorari. Issue-

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zone of criminal prohibition. *Id.* 500 U.S. at 272-73. Neither the "honest services" statute nor § 666 contains anything remotely approaching a "clear statement" in this respect. The "honest services" law is clear as mud in many respects, including this one. And § 666 contains the crucial, but unclear, limitation that it prohibits actions only if they are done "corruptly." Without that textual limitation, nearly *any* campaign contribution motivated by a desire to "reward" a specific official action that the donor thought to have been a good idea would, bizarrely enough, be a crime. "Corruptly" is therefore an essential, but unfortunately unclear, part of the statute; the *McCormick* standard is the best interpretation of what it means, in the context of campaign contributions that are alleged to have been bribes.

advocacy or referendum campaigns are a major part of the current political landscape in many states; the law about them should be clear, no less than the law regarding campaigns for elective office.

Likewise, one might conceivably label as *dicta* the discussion of the standard applicable to campaign contribution cases, in *Ganim*, *Kincaid-Chauncey*, and *Abbey*, since those decisions were primarily concerned with fact scenarios that did *not* involve campaign contributions. But such an argument would be misplaced as grounds for opposing certiorari. In those Circuits that have said in published opinions that proof of an "express" *quid pro quo* promise is required in a campaign contribution case, surely no United States Attorney could justifiably seek an indictment and try for a conviction on a looser standard. Therefore, in practice, the stark conflict between the law in the Eleventh Circuit, and the law in Circuits such as the Second, Sixth, and Ninth, will not go away. Evidence and potential inferences that can lead to a conviction and sentence in the Eleventh Circuit will not lead even to an indictment in some other Circuits. It is an immediate problem, and a problem that will not disappear, and a problem that should not be allowed to linger.

But even if there were not a division among the Circuit Courts, still certiorari would be appropriate because the issue is so important and because the decision below is so hard to square with *McCormick* itself. This Court in *McCormick* required an "explicit *quid pro quo*," an "explicit promise or undertaking" by the official, to make receipt of a contribution a crime. This Court in *McCormick* rejected the dissenters' view that an implicit exchange of the contribution for some specific action was enough to constitute

a crime. The Eleventh Circuit has somehow found itself able to adopt the dissenters' view, and to declare that a promise or undertaking can be "explicit" when it is only implicit. This gives prosecutors extraordinary discretionary power to target officials, or not, for actions that are quite routine. The Court should grant review in order to return clarity to this area of law.[6]

B. On the second question presented, the decision below is contrary to the text of § 1512(b)(3), and contrary to the decisions of other Circuits.

The second question presented, about the reach of 18 U.S.C. § 1512(b)(3), also deserves this Court's full consideration. This could be viewed as resolving a split in lower court authority, as we will show. But frankly the question is so easily answered—and the Eleventh Circuit's treatment of the issue is so devoid of reasoned attention to the question—that it could also be viewed as a necessary exercise in error-correction. The bottom line is that Governor Siegelman stands convicted under § 1512(b)(3) despite the fact

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[6] Even if this Court ultimately agreed with the Eleventh Circuit that an unspoken state of mind was enough for conviction in this sort of case, still the Court should reverse Governor Siegelman's conviction based on due process fairness and notice concerns; given the state of the law at the time, he could not have known that the law allowed conviction without an actually-stated express *quid pro quo*. Moreover, even if the Court adopted a standard that allowed conviction based on unspoken states of mind, the Court should reverse Governor Siegelman's conviction because of the insufficiency of the evidence; and in that respect, the Court should scrutinize the evidence at or near a *de novo* level of scrutiny (without deference to the jury's actual or potential conclusions) because of the First Amendment concerns involved in the case.

that (even accepting the Eleventh Circuit's portrayal of the facts) there was not a bit of evidence that he had the "intent" that the statute covers.

The Court of Appeals upheld the conviction on this count, portraying the evidence as allowing the inference that Governor Siegelman engaged in an effort to "cover up" an earlier, allegedly improper, payment from Lanny Young.[7] This "coverup," according to the Court of Appeals, consisted of the creation of documents, including the check that was the gravamen of this count. In what sense was it allegedly a "coverup"? According to the Court of Appeals, it was in the sense that it was an effort to convey the impression that (rather than giving money to Governor Siegelman) Young had merely lent money to Bailey to buy the motorcycle.

The theory of the prosecution was that Governor Siegelman persuaded Bailey to write the check, and that he and Bailey misled Bailey's counsel about the nature of it. That is how the prosecution sought to meet the first element of the statute, which requires proof of persuasion, misleading, or other sorts of acts. On full review, we believe the Court would see that neither of those facts can fairly be inferred from the evidence; there was, for instance, not actually any evidence that Governor Siegelman even asked, much less persuaded, Bailey to write this check.

But whether the charge was that he "persuade[d]" or "engage[d] in misleading conduct," the statute also required proof of a particular intent: the intent to "hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of

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[7] As noted above, the jury rejected the charges relating to the earlier payment itself.

information relating to the commission or possible commission of a Federal offense."

This statute, in other words, prohibits efforts to stop or keep people (by persuasions, threats, or trickery) from providing information to law enforcement, or at least to slow them down from doing so. That is the plain meaning of the "intent to hinder, delay or prevent" portion of the statute. There are other statutes that cover, more generally, improper attempts to influence what people say in certain contexts. *See, e.g.*, 18 U.S.C. § 1512(b)(1). Those statutes might cover efforts to induce people to give information to law enforcement that they would not otherwise have given, but this is not such a statute; Congress decided not to use the word "influence" in § 1512(b)(3). There are also other obstruction statutes that cover misleading acts involving documents in certain contexts. *See, e.g.*, 18 U.S.C. § 1512(c)(1). There are other obstruction statutes that are drawn as catch-all provisions, but only in contexts that are inapplicable here. *See* 18 U.S.C. § 1512(c)(2) (catch-all provision regarding corruptly influencing an "official proceeding"). Congress knows how to write the obstruction statutes it wants, to cover the behavior it wants to criminalize, as broadly or narrowly as it chooses.

Rather than focusing on the words of the "intent" clause of the statute, the Court of Appeals was satisfied with its conclusion that the intent was to engage in a "cover up." But that is not what the statute demands. Some "coverups," it is true, might involve keeping witnesses from conveying information to law enforcement. But not all "coverups" are of that sort; there can be coverups of other types. "Coverup" is not a legal term, under federal law; it is a colloquial term that covers many sorts of things. If there was a

"coverup" in this case, was it of the sub-species that is based on keeping people from telling law enforcement what they know? The Court of Appeals did not say, and it cited no evidence that it was.

The Court of Appeals thus went astray by failing to adhere to the words of the statute, and in particular its clause about the required "intent." The Court of Appeals allowed the colloquialism "coverup" to substitute for adherence to this portion of the statute's plain text. In that, the Court of Appeals departed from the holdings of other Circuits. Consider, for instance, *United States v. Hertular*, 562 F.3d 433 (2nd Cir. 2009). There, the Second Circuit recognized that a conviction under this statute "requires 'a specific intent to interfere with the communication of information'." *Id.* at 443, *citing United States v. Genao*, 343 F.3d 578, 586 (2d Cir. 2003). By contrast, as recognized in *Hertular*, an intent to "hinder or prevent . . . simply the filing of an indictment" is *not* enough to come within the statute. 562 F.3d at 443. It is the intent to hinder, delay or prevent communication to law enforcement—*not* a perceived intent to "cover up" or avoid indictment in a more generic sense—that makes this crime.

The Eleventh Circuit did not suggest that there was evidence to come within the actual words of the "intent" clause of the statute. Nor did the prosecution argue that any evidence supported a finding of such particular intent, for that matter. There is absolutely no suggestion, for instance, that Bailey would have given information to law enforcement, such that Governor Siegelman formulated the intent to hinder, delay or prevent him from doing so. Nor is it plausible to suggest that Governor Siegelman had that intent as to Bailey's counsel, the person

allegedly misled. There is simply no way that Bailey's own lawyer would have gone to law enforcement to inculpate Bailey and Siegelman with information that he possessed, such that Bailey and Siegelman would have misled him in order to stop him; that is the antithesis of a lawyer's role. Even the Court of Appeals was unwilling to make such far-fetched suggestions. But only that sort of far-fetched suggestion, or something else equally lacking in evidentiary foundation and unmentioned by the Court of Appeals, could bring the case within § 1512(b)(3), once one focuses (as the Court of Appeals did not) on the words of the statute.[8]

So as to avoid possible confusion, we note that the issue we are raising here is separate from some other issues that often arise in the caselaw under § 1512(b)(3). There is sometimes debate, for instance, about how much proof there must be of a defendant's intent to interfere with a *federal* as opposed to *state* investigation. And there is sometimes debate about whether state law enforcement officials can count as the people who are misled, as the people whose communications are intended to be hindered.[9]

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[8] The indictment, notably, had tracked the "intent" prong of the statute: the charge was that Governor Siegelman's intent was to hinder, delay or prevent either Bailey, or Young, or Bailey's lawyer from communicating to the FBI. But as noted in the text above, neither the Court of Appeals nor the prosecution's appellate team claimed that any evidence at trial actually proved such intent.

[9] The United States sometimes does frame indictments so as to allege that law enforcement officials are the people whose communications to other law enforcement officials are intended to be hindered, delayed or prevented. The United States thereby tries, in some cases, to have the statute cover some attempts to "cover up" things by misleading investigators; the

This case is simpler than those, and should not be confused with them. This case involves a stark absence of proof of *any* intent to hinder, delay, or prevent communications to law enforcement. The absence of such proof was so stark that the Court of Appeals did not claim that there was such proof; it rested instead on the legally erroneous view that it was enough to find an intent to "cover up."

Thus only by departing from the plain text of the statute and from decisions like *Genao* could the Eleventh Circuit affirm Governor Siegelman's conviction on this count. For these reasons, we respectfully submit that this question 2 is deserving of certiorari even on its own. But most assuredly, if the Court grants the writ as to question 1, then the Court should grant the writ as to question 2 as well.

We recognize that the error of the Court of Appeals on question 2 was perhaps a matter of error caused by inattention to careful legal reasoning, as opposed to being a conscious disagreement on a reasonably disputable point of law. But this should not lead to a denial of review. Even though this Court does not often grant review for error-correction, it should do so in this case. Otherwise there would be the troubling likelihood of a grave injustice: that Governor Siegel-

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theory in such cases is that the "coverup" keeps the investigators from learning inculpatory facts and thus hinders them from communicating such inculpatory facts to others in law enforcement. This case does not require the Court to opine on the validity of that workaround. If the workaround is ever valid, it is only in cases where the indictment alleges it, and the jury finds it. Here, as noted above, the indictment alleged that the intent was to hinder, delay, or prevent communications by Bailey, Young, or Bailey's lawyer—not to hinder, delay, or prevent communications within law enforcement.

man would finally obtain exoneration on the core charges against him, only to face imprisonment on an afterthought charge that was not actually supported by the law and the evidence.

CONCLUSION

By granting review, this Court would have the opportunity to right an injustice, to free a man who has committed no crime, and to clarify the law in a manner that will be important to all candidates, elected officials, and politically engaged citizens. For the foregoing reasons, this Court should grant review.

Respectfully submitted,

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